p. 3 & note 1, *supra*) required proof that the defendant "actually use[d] a facility in a manner that implicates interstate commerce, not just that the facility itself possess[ed] the capability of affecting interstate commerce." Pet. App. 26a; see *id.* at 8a-26a. The court held that the government had "satisfied its evidentiary burden" by introducing "expert testimony that the telephone calls to Valoze's cellular phone traveled through a switching center in Jacksonville, Florida before reaching their final destination." *Id.* at 27a. The court further held that the jury instruction on the interstate-commerce jurisdictional element was erroneous, but that the instructional error was harmless. See *id.* at 29a-32a.

b. On February 3, 2004, the court of appeals issued an order vacating the panel opinion and granting rehearing en banc. Pet. App. 65a.

c. In September 2004, while the case was pending before the en banc court of appeals, petitioner filed in the court of appeals a Motion for Remand for Re-Sentencing in light of this Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). See Pet. App. 99a-102a. Petitioner contended that his sentence was unconstitutional under *Blakely* because the district court had enhanced that sentence based on the court's factual finding that petitioner had testified falsely at trial. See *id.* at 99a, 101a-102a. Petitioner also noted that this Court had recently granted petitions for writs of certiorari in *United States* v. *Booker*, No. 04-104, and *United States* v. *Fanfan*, No. 04-105. See Pet. App. 102a.

d. After the court of appeals granted rehearing en banc, but before the en banc court issued any ruling, Congress amended 18 U.S.C. 1958(a) to replace the phrase "facility in" with "facility of." See Pet. App. 67a; note 1, *supra*. That amendment "ma[de] clear that

§ 1958 now establishes federal jurisdiction whenever any 'facility of interstate commerce' is used in the commission of a murder-for-hire offense, regardless of whether the use is interstate in nature (i.e. the phone call was between states) or purely intrastate in nature (i.e. the phone call was made to another telephone within the same state)." Pet. App. 67a.

On January 14, 2005, the en banc court of appeals vacated its prior grant of rehearing en banc. Pet. App. 66a-67a. In light of the intervening amendment to 18 U.S.C. 1958(a), the court of appeals concluded that this case no longer presented an issue of sufficient importance to warrant en banc review. Pet. App. 67a. The court therefore vacated its order of February 3, 2004, insofar as that order had granted rehearing en banc. *Ibid.* Rather than reinstate the panel opinion, however, the court of appeals remanded the case to the panel for further consideration. *Ibid.*

e. On January 18, 2005, on remand from the en banc court, the court of appeals panel again affirmed petitioner's convictions under 18 U.S.C. 1958. Pet. App. 68a-95a. The court declined to resolve the question whether, under the version of Section 1958 that was in effect when petitioner made the telephone calls to Agent Valoze (and which is therefore controlling in the instant prosecution), the government was required to prove that the telephone signal crossed state lines. The court found it unnecessary to decide that issue because any such requirement was satisfied in this case, since the government's undisputed expert testimony established that each of the four calls was routed through Jacksonville, Florida. See *id.* at 80a-82a. The court of appeals also concluded, for essentially the same reason, that it was unnecessary to determine whether the jury instruc-

tions on the interstate-commerce element were defective because any instructional error was harmless beyond a reasonable doubt. See *id.* at 83a-85a.

f. Also on January 18, 2005, the court of appeals issued a separate order denying petitioner's motion to remand for resentencing. Pet. App. 103a-104a. The court explained that petitioner had failed to challenge his sentence in his opening brief, see *id.* at 103a, and that, under circuit precedent, "issues not raised in the initial brief are deemed abandoned," *id.* at 104a. The court of appeals' order denying the motion to remand did not cite this Court's decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005), which had been issued six days earlier.

ARGUMENT

1. Petitioner contends (Pet. 5-12) that the Eleventh Circuit's practice of treating as abandoned *Booker* and *Blakely* claims that are not raised in a party's initial brief is inconsistent with *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), and with this Court's statement in *Booker* that courts "must apply [its] holding * * * to all cases on direct review." 125 S. Ct. at 769. Petitioner also asserts (Pet. 8-9) that the majority of courts of appeals have considered *Booker* claims on the merits even when a defendant's challenge to his sentence was not raised in his opening brief. Petitioner's contentions lack merit, and further review is not warranted.

a. i. In *Griffith*, this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final." 479 U.S. at 328. Because the petitioner in *Griffith* had preserved the claim on which he sought review, the Court did not have occasion to consider the

interplay between that retroactivity rule and prudential doctrines such as principles of waiver and forfeiture. See *id.* at 317, 318.

Application of procedural default rules is consonant with the retroactivity rule announced in *Griffith*. The Court in *Griffith* concluded that retroactive application of new rules on direct appeal was necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." 479 U.S. at 323. That rationale is in no way inconsistent with application of procedural default rules to bar consideration of claims that have not been adequately preserved. A defendant who has abandoned a claim of error is not "similarly situated" (*id.* at 323) to a defendant who has preserved the claim. Cf. *Shea* v. *Louisiana*, 470 U.S. 51, 59-60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "[t]he one litigant already has taken his case through the primary system" and "[t]he other has not").

Because the question whether a particular claim is properly before an appellate court is distinct from the question of what law applies to the adjudication of the claim, application of procedural bar rules does not offend principles requiring the retroactive application of new constitutional rules to cases open on direct review:

> Retroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway. It makes no more sense to say that a procedural bar should not be applied in this situa-

> tion because doing so undermines or frustrates retroactive application of a Supreme Court decision, than it does to say that procedural bars should not be applied in any situation because doing so undermines or frustrates the constitutional doctrines and commands underlying the issue that is held to be defaulted.

United States v. *Ardley*, 273 F.3d 991, 992 (11th Cir. 2001) (Carnes, J., concurring in denial of rehearing en banc), cert. denied, 535 U.S. 979 (2002).

On several occasions, this Court has indicated that the retroactivity principle embodied in *Griffith* does not preclude the application of procedural default rules. In *Shea*, for example, the Court held that the rule announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), would be applied retroactively to cases pending on direct review. 470 U.S. at 59. The Court noted, however, that the retroactive application of *Edwards* was "subject, of course, to established principles of waiver, harmless error, and the like." *Id.* at 58 n.4; see *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (explaining that, while the rule announced in *United States* v. *Gaudin*, 515 U.S. 506 (1995), applied retroactively under *Griffith*, unpreserved claims were subject to review only for plain error); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 105 n.1 (1993) (Scalia, J., concurring) (noting, as the Court extended the holding of *Griffith* to civil cases, that "a party may procedurally default on a claim in either

[the civil or criminal] context").[2] Petitioner cites no case in which this Court has suggested a contrary rule.

ii. Petitioner contends (Pet. 6, 8) that the decision below is inconsistent with this Court's direction in *Booker* that the holding of that case is to be applied "to all cases on direct review." 125 S. Ct. at 769. That argument lacks merit. In *Booker*, the Court merely indicated that, in keeping with *Griffith*, the rule applied to all cases on direct review; the Court did not indicate that the rule would have the same effect in every case regardless of whether a defendant had preserved a *Booker* claim. Indeed, the Court stated that it "expect[ed] reviewing courts to apply ordinary prudential doctrines" in resolving future *Booker* claims and to "determin[e], for example, whether the issue was raised below and whether it fails the 'plain error' test." *Ibid.*

b. Petitioner contends (Pet. 8-9) that most courts of appeals to consider the question have addressed *Booker* claims on the merits even when no such claim was raised in the defendant's opening brief, and that this Court's review is necessary to resolve the circuit conflict.

i. The Federal Rules of Appellate Procedure provide that an appellant's brief "must contain * * * appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(9)(A). The courts of appeals have uni-

---

[2] Accord, *e.g.*, *United States* v. *Humphrey*, 287 F.3d 422, 442 (6th Cir. 2002) (noting that, although *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), applies retroactively to cases on direct review, unpreserved claims were subject to plain-error review); *United States* v. *Oaten*, 286 F.3d 622, 634 (2d Cir. 2002) (same); *United States* v. *Wheat*, 278 F.3d 722, 739 (8th Cir. 2001) (same), cert. denied, 537 U.S. 850 (2002); *United States* v. *Keys*, 133 F.3d 1282, 1285-1286 (9th Cir.) (en banc) (holding that, although rule of *Gaudin* applied retroactively to cases on direct review, unpreserved claims were subject to review only for plain error), cert. denied, 525 U.S. 891 (1998).

formly interpreted that provision to establish a general prudential rule that "[a]n appellant waives any issue which it does not adequately raise in its initial brief." *Playboy Enters., Inc.* v. *Public Serv. Comm'n*, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990).[3] The

---

[3] Accord, *e.g.*, *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) ("It is well established that an argument not raised on appeal is deemed abandoned, and we will not ordinarily consider such an argument unless manifest injustice otherwise would result.") (internal citations and quotation marks omitted); *Ghana* v. *Holland*, 226 F.3d 175, 180 (3d Cir. 2000) ("It is well settled that if an appellant fails to comply with these [Rule 28] requirements on a particular issue, he normally has abandoned and waived that issue on appeal.") (quoting *Kost* v. *Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993)) (alterations omitted); *Shopco Distrib. Co.* v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 170 n.3 (4th Cir. 1989) (holding that any claim not raised in a party's initial brief will be deemed waived) (collecting authorities); *United States* v. *Miranda*, 248 F.3d 434, 443 (5th Cir. 2001) ("Failure to satisfy the requirements of Rule 28 as to a particular issue ordinarily constitutes abandonment of the issue."), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *Bickel* v. *Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996) ("We normally decline to consider issues not raised in the appellant's opening brief.") (quoting *Priddy* v. *Edelman*, 883 F.2d 438, 446 (6th Cir. 1989)), cert. denied, 519 U.S. 1093 (1997); *Holman* v. *Indiana*, 211 F.3d 399, 406 (7th Cir.) (finding arguments not raised in initial brief waived), cert. denied, 531 U.S. 880 (2000); *Sweat* v. *City of Fort Smith*, 265 F.3d 692, 696 (8th Cir. 2001) ("[C]laims not raised in an initial appeal brief are waived."); *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief."); *Adams-Arapahoe Joint Sch. Dist. No. 28-J* v. *Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) (holding that "[a]n issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal"); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 319-320 (D.C. Cir. 1985) (deeming an issue waived where a party did not raise it until supplemental briefing); *Becton Dickinson & Co.* v. *C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990) ("[A]n issue not raised by an appellant in its opening brief * * * is waived.").

courts of appeals have recognized, however, that courts have discretionary authority to address issues not timely raised by the parties. See, *e.g.*, *United States* v. *Miranda*, 248 F.3d 434, 443-444 (5th Cir. 2001) (noting that "the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion," and that the court may consider an issue that was not timely raised "where substantial public interests are involved"), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) (court will review an issue not raised in the brief where manifest injustice would otherwise result); *Leer* v. *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (same); Fed. R. App. P. 2 (granting courts discretion to suspend most rules for "good cause").

Consistent with that general approach, the Eleventh Circuit has recognized that it has the authority to relieve litigants of the consequences of default and to address an issue on the merits where manifest injustice would otherwise result.[4] In the exercise of its discretion, however, the Eleventh Circuit has declined to exempt *Booker* and *Blakely* claims from the operation of its longstanding rule that it will not consider claims unless they were timely raised in the appellant's opening brief. See, *e.g.*, *United States* v. *Dockery*, 401 F.3d 1261, 1262-

---

[4] See, *e.g.*, *United States* v. *Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988) (considering, pursuant to Federal Rule of Appellate Procedure 2, an issue raised only in co-defendant's brief, despite defendant's failure to adopt by reference his co-defendant's arguments); *Gramegna* v. *Johnson*, 846 F.2d 675 (11th Cir. 1988) (vacating judgment based on issue raised sua sponte by the court, pursuant to Rule 2); *United States* v. *Levy*, 391 F.3d 1327, 1335 (11th Cir. 2004) (Hull, J., concurring in denial of rehearing en banc) ("The issue is not whether this Court has the power to consider issues not raised in the initial brief; of course it does."), vacated and remanded, 125 S. Ct. 2542 (2005).

1263 (11th Cir. 2005); *United States* v. *Levy*, 379 F.3d 1241, 1243 n.3 (11th Cir. 2004) ("'there would be no miscarriage of justice if we decline to address' *Blakely*-type issues not raised in opening briefs on appeal") (quoting *McGinnis* v. *Ingram Equip. Co.*, 918 F.2d 1491, 1496 (11th Cir. 1990)), vacated and remanded, 125 S. Ct. 2542 (2005); see also *Ardley*, 242 F.3d at 990 (declining to exempt claims under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), from operation of rule).

Petitioner asserts that "[t]he majority of Circuits to consider the issue have followed this Court's direction and applied *Booker*'s holdings regardless of whether a defendant raised *Booker* or *Blakely* issues in his or her brief." Pet. 8; see Pet. 8-9 (citing cases). Most of the decisions on which petitioner relies, however, simply address *Booker* claims on the merits without citing or discussing the general rule that courts will not entertain issues not raised in a party's opening brief.[5] Petitioner cites only one case (Pet. 9), *United States* v. *Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005), in which a court of appeals has explicitly construed *Booker* to override the usual prudential rule that issues not raised in an opening brief will be deemed abandoned. That statement in *Washington* was made without briefing or argument by the parties on the issue. The government was unable to seek rehearing in that case because the court of appeals, after the time for filing a petition for rehearing had expired, denied the timely filed joint motion of the parties for an extension of time in which to file a rehearing petition. The Fourth Circuit should be given an

---

[5] See *United States* v. *Paladino*, 401 F.3d 471, 481 (7th Cir. 2005); *United States* v. *Ameline*, 400 F.3d 646, 651-652 (9th Cir. 2005); *United States* v. *Oliver*, 397 F.3d 369, 377 n.1 (6th Cir. 2005); *United States* v. *Crosby*, 397 F.3d 103, 119 (2d Cir. 2005).

opportunity to reconsider its erroneous conclusion in an appropriate case."

ii. In any event, rules governing the proper treatment of claims that are not raised in a defendant's opening brief but are supported by intervening precedent may appropriately be viewed as local rules that can differ from circuit to circuit. So long as local rules are reasonable, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Federal Rule of Appellate Procedure 47(a), there is no requirement of "uniformity among the circuits in their approach to [such] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993). Indeed, this Court has specifically recognized the power of courts of appeals to adopt rules restricting the consideration of issues not raised in a timely manner. In *Thomas*, the Sixth Circuit had pro-

---

[6] Some courts of appeals currently are refining their analysis of when it is appropriate to consider tardily raised claims based on intervening precedent. The Fifth Circuit, which previously had entertained such claims, see, *e.g.*, *United States* v. *Miranda*, 248 F.3d 434, 443-444 (2001), cert. denied, 534 U.S. 980 (2001) and 1086 (2002), recently has followed Eleventh Circuit precedent to conclude that "absent extraordinary circumstances, we will not consider *Booker* issues raised for the first time in a petition for rehearing." *United States* v. *Taylor*, No. 03-10167, 2005 WL 1155245 (5th Cir. May 17, 2005) (per curiam) (citing, *inter alia*, *Ardley*); see *United States* v. *Hernandez-Gonzalez*, 405 F.3d 260, 261-262 (5th Cir. 2005) (per curiam) (citing, *inter alia*, *Levy* and *Ardley*); *United States* v. *Lewis*, No. 04-10102, 2005 WL 1394949 (5th Cir. June 14, 2005) (per curiam) (following *Taylor*). The First Circuit, on the other hand, recently concluded that the "substantial change in the applicable law wrought by the Supreme Court's decisions in *Blakely* and *Booker* * * * constitutes an 'exceptional circumstance'" in which the court would decline to apply its general rule that tardily raised issues "are generally considered waived." *United States* v. *Vazquez-Rivera*, 407 F.3d 476, 487 (1st Cir. 2005).

mulgated a rule providing that a party who failed to object in the district court to a magistrate's recommendation thereby waived the right to appellate review of a district court judgment adopting that recommendation. 474 U.S. at 144. This Court held that the Sixth Circuit had not abused its discretion by adopting that rule. See *id.* at 145-155.

The Sixth Circuit's "nonjurisdictional waiver provision," like the rule at issue here, would ordinarily "preclud[e] appellate review of any issue" not raised in the manner prescribed, although the court of appeals could "excuse the default in the interests of justice." 474 U.S. at 147-148, 155. Noting that such a rule was supported by sound considerations of judicial economy, *id.* at 148, this Court concluded that the courts of appeals may adopt "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Id.* at 146-147 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). Similarly, procedural bar rules of the sort at issue here promote efficiency by avoiding piecemeal briefing of appeals and ensuring that the appellee has the opportunity to respond to all issues raised by the appellant without supplemental briefing. Such rules are especially important because of the courts of appeals' increasingly heavy caseloads.

c. This Court has denied review in a number of cases in which the Eleventh Circuit declined to entertain a claim under the intervening decisions in *Blakely* or *Apprendi* solely because it was not raised in the petitioner's opening brief, see, *e.g.*, *Ardley* v. *United States*, 535 U.S. 979 (2002) (No. 01-8714); *Nealy* v. *United States*, 534 U.S. 1023 (2001) (No. 01-5152); *Padilla-Reyes* v. *United States*, 534 U.S. 913 (2001) (No.

01-5284), including cases in which the petitioner specifically challenged application of the procedural bar rule in that context. See, *e.g.*, *Phillips* v. *United States*, 536 U.S. 961 (2002) (No. 01-5718) (denying review when petitioner challenged application of rule to bar consideration of *Apprendi* claim); *Garcia* v. *United States*, 534 U.S. 823 (2001) (No. 00-1866) (denying review when Eleventh Circuit declined, on remand from this Court for reconsideration in light of *Apprendi*, to consider claim because it was not raised in initial brief); see also *Thompson* v. *United States*, 535 U.S. 1114 (2002) (No. 01-8603) (challenging application of rule to bar consideration of ex post facto claim). There is no reason for a different result in this case.

In other cases raising the same issue, this Court has granted petitions for writs of certiorari, vacated the judgments of the court of appeals, and remanded for further consideration in light of *Booker*. See *Hembree* v. *United States*, No. 04-1210, 2005 WL 575559 (June 13, 2005); *Dixon* v. *United States*, No. 04-8932, 2005 WL 540062 (June 6, 2005); *Levy* v. *United States*, No. 04-8942, 2005 WL 540692 (June 6, 2005). For two reasons, that approach is unwarranted here.

First, the Eleventh Circuit confirmed in *Dockery* that a remand for further consideration in light of *Booker* does not alter the court of appeals' application of its longstanding rule that issues not raised in an appellant's opening brief are deemed abandoned. See 401 F.3d at 1262; accord, *e.g.*, *United States* v. *Mosley*, No. 04-11189, 2005 WL 1317026, at *1 (11th Cir. June 2, 2005) (reinstating original judgment after this Court granted certiorari, vacated judgment, and remanded for further consideration in light of *Booker*); *United States* v. *Senn*, 128 Fed. Appx. 96 (11th Cir. 2005) (per curiam)

(same).[7] Second, the court of appeals in the instant case denied petitioner's motion to remand for resentencing six days *after* this Court issued its decision in *Booker*. Pet. App. 103a-104a. It is true that the Eleventh Circuit did not cite *Booker* in its order denying the remand motion. But petitioner acknowledges that the court of appeals "was undoubtedly aware [of *Booker*] at the time of the issuance of the order." Pet. 8.

2. Petitioner argues (Pet. 13-27) that this Court should grant review to determine whether the version of 18 U.S.C. 1958(a) that was in effect at the time of his own offenses (*i.e.*, in August 2001, see pp. 2-3, *supra*) required proof that a communication furthering the offense traveled in interstate commerce. Petitioner correctly identifies (Pet. 14-15) a circuit conflict on that question. See Pet. App. 78a (discussing circuit conflict); compare *United States* v. *Weathers*, 169 F.3d 336, 339-343 (6th Cir.) (holding that prior version of Section 1958(a) required proof of a communication in interstate commerce), cert. denied, 528 U.S. 838 (1999), with *United States* v. *Richeson*, 338 F.3d 653, 660-661 (7th Cir.) (holding that former Section 1958(a) required proof that a facility of interstate commerce, such as a telephone, was used in the offense, not that a particular communication passed in interstate commerce), cert. denied, 540 U.S. 934 (2003); *United States* v. *Marek*, 238 F.3d 310, 315-323 (5th Cir.) (same), cert. denied, 534

---

[7] The Fifth Circuit has taken the same approach. See *Taylor*, 2005 WL 1155245, at *1 (on remand from this Court for reconsideration in light of *Booker*, Fifth Circuit reinstated original judgment because defendant had raised *Booker* argument for the first time in petition for a writ of certiorari and "extraordinary circumstances" did not warrant relief); *Lewis*, 2005 WL 1394949, at *1 (same).

U.S. 813 (2001). For two reasons, the question presented does not warrant this Court's review.

First, because the 2004 statutory amendment (see note 1, *supra*) has eliminated any ambiguity in Section 1958(a) with respect to offenses committed after the amendment's effective date, the question presented is one of slight and diminishing practical importance. Petitioner notes (Pet. 27) that the former version of Section 1958(a) will apply to pending and future trials and appeals involving alleged pre-amendment violations. This Court's resolution of the question presented, however, would affect the outcome only of cases involving purely intrastate use of facilities of interstate commerce. Petitioner offers no reason to believe that any significant number of such cases involving pre-amendment conduct remain pending in the federal system.

Second, this case would in any event be an inappropriate vehicle for resolution of the question presented, even if that issue otherwise warranted this Court's review. After this case was remanded to the panel by the en banc court of appeals, the Eleventh Circuit held that it need not decide which interpretation of former Section 1958(a) was correct because petitioner's convictions would be affirmed under either construction. See Pet. App. 80a-85a; p. 6, *supra*. The court based that conclusion on undisputed "expert testimony that each of the four calls [petitioner] placed to Agent Valoze's cellular phone was routed from Georgia through [a] Jacksonville, Florida switching center, and then back into Georgia." Pet. App. 80a-81a.[5] Because the outcome of this case

[5] Petitioner's claim of a circuit conflict on the construction of former 18 U.S.C. 1958(a) rests on the Sixth Circuit's decision in *Weathers*. See Pet. 14-15. After concluding that former Section 1958(a) required proof of a communication in interstate commerce, however, the court in

would have been the same if the court of appeals had adopted petitioner's proposed construction of former Section 1958(a), the interpretive question presented in the certiorari petition does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JOHN C. RICHTER
Acting Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

JUNE 2005

Weathers found the statute's jurisdictional element to be satisfied by proof that a telecommunications company had facilitated a telephone call between persons within the same State "by sending a search signal to communications equipment in another state to locate Weathers's cellular telephone." 169 F.3d at 342. There is consequently no reason to believe that petitioner's appeal of his convictions would have been resolved differently if this case had arisen in the Sixth Circuit.

Supreme Court, U.S.
FILED
JUL 29 2005
OFFICE OF THE CLERK

(2)

No. 04-1438

In the Supreme Court of the United States

CARL M. DRURY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

THOMAS A. WITHERS
Counsel of Record

GILLEN PARKER & WITHERS LLC
8 EAST LIBERTY STREET
P.O. BOX 10164
SAVANNAH, GA 31412
(912) 447-8400

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Alexis v. United States,
125 S.Ct. 2927 (June 13, 2005) (Mem.) 7

Baussan v. United States,
125 S.Ct. 2982 (June 27, 2005) (Mem.) 7

Desist v. United States,
394 U.S. 244 (1969) 2

Griffith v. Kentucky,
479 U.S. 314 (1987) 1, 2, 3

Hembree v. United States,
125 S.Ct. 1904 (June 13, 2005) (Mem.) 7

Johnson v. Zerbst,
304 U.S. 458 (1938) 4

Stutson v. United States,
516 U.S. 193 (1996) 8

United States v. Ardley,
273 F.3d 991 (11th Cir. 2001) 2, 7

United States v. Booker,
___ U.S. ___, 125 S.Ct. 738 (2005) 1, 3, 4, 6, 9

United States v. Hernandez-Gonzalez,
405 F.3d 260 (5th Cir. 2005) 5

United States v. Higdon,
No. 03-14365, 2005 WL 1677544
(11th Cir. July 8, 2005) 3, 5, 7

United States v. Levy,
391 F.3d 1327 (11th Cir. 2004) 2, 4, 6, 7

United States v. Lewis,
No. 04-10102, 2005 WL 1394949
(5th Cir. June 14, 2005) 5

United States v. Olano,
507 U.S. 725 (1993) 4

United States v. Pipkins,
No. 02-14306, 2005 WL 1421449
(11th Cir. June 20, 2005) 7

United States v. Sanchez,
269 F.3d 1250 (11th Cir. 2001) 4, 6

United States v. Taylor,
409 F.3d 675 (5th Cir. 2005) 5

United States v. Vanorden,
No. 03-11083, 2005 WL 1531151
(11th Cir. June 30, 2005) 1, 6

Statutes

18 U.S.C. § 1958 . . . . . 8, 9, 10

Rules

Federal Rule of Criminal Procedure Rule 52(b) 4

REPLY ARGUMENT

1. Petitioner submitted that his case should be remanded for resentencing pursuant to *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005) to correct Petitioner's sentence based upon facts found by the sentencing judge, and not facts admitted by Petitioner nor found by a jury beyond a reasonable doubt. (Pet. 5-12.) Respondent does not contest the illegality of Petitioner's sentence under *Booker*. (Resp. 7-17.) I, but instead, Respondent mounts an extended defense of the unique practice employed by the Eleventh Circuit to deny review to all defendants who did not raise *Booker* claims in their opening briefs. (*Id.*) Petitioner submits that this practice is contrary to the clear holdings of this Court, inconsistent with every other circuit court of appeals, and an imprudent and extraordinary exercise of a prudential rule. As Eleventh Circuit Judge Tjoflat recently wrote, the Eleventh Circuit is applying a "strange, bad rule," *United States v. Vanorden*, No. 03-11083, 2005 WL 1531151, at *2 (11th Cir. June 30, 2005) (Tjoflat, J., specially concurring), and that "[h]opefully [the Eleventh Circuit] sitting en banc, or the Supreme Court, will soon correct this practice." *Id.* at 6.

a. Respondent correctly points out that the petitioner in *Griffith v. Kentucky*, 479 U.S. 314 (1987), had preserved his claim on which he sought review under a new rule for criminal prosecutions, (Resp. 7-8), but fails to address the unambiguous language of this Court's holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final." 479 U.S. at 328. This critical language is mirrored in the Court's holding in *Booker*. 125 S.Ct. at 769 (quoting *Griffith*, 479 U.S. at 328). While both *Griffith* and *Booker* recognize that ordinary prudential doctrines should be applied, neither suggest that a defendant must raise the issue

in his initial appellate brief in order to receive the benefit of a new rule. The Eleventh Circuit's rule, however, imposes a new and unprecedented hurdle:

> [T]he panel's decision *narrows* the class of cases entitled to retroactivity. The panel's new rule is that cases are entitled to the benefit of an intervening decision *only if:* 1) the case was not yet final at the time of the intervening decision; *and* 2) the litigant presaged the intervening decision by raising the issue addressed by that decision in the litigant's initial brief on appeal.

United States v. Ardley, 273 F.3d 991, 999 (11th Cir. 2001) (Tjoflat, J., dissenting from denial of rehearing en banc) (emphasis in original). *See also United States v. Levy*, 391 F.3d 1327, 1240 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc). As another Eleventh Circuit Judge wrote, "Our internal circuit rules for how and whether an issue can be raised on appeal cannot override the concerns about fundamental fairness and the integrity of judicial review that the Supreme Court identified in *Griffith*." *Levy*, 391 F.3d at 1351 (Barkett, J., dissenting from denial of rehearing en banc).

Respondent argues that the Eleventh Circuit is simply applying a "local rule" which can differ from circuit to circuit and is valid so long as reasonable and consistent with the Acts of Congress and the Federal Rules of Appellate Procedure. (Resp. 14-15.) This is contrary to the central teaching of *Griffith* that "selective application of new rules violates the principle of treating similarly situated defendants the same." 479 U.S. at 323 (citing *Desist v. United States*, 394 U.S. 244, 253-254 (1969) (Harlan, J., dissenting)). As Judge Tjoflat recently pointed out in yet another dissent:

> [I]t hardly comports with the ideal of evenhanded justice when similarly situated defendants are treated differently based only on the location of the federal court in which they were sentenced. District courts in the Eleventh Circuit sentence approximately ten percent of all defendants sentenced in the federal courts. Accordingly, while ninety percent of all defendants who did not raise *Blakely/Booker* claims in their initial briefs (for the imminently sensible reason that such claims were squarely foreclosed by then-controlling precedent) will be permitted to raise these now-viable claims in some sort of supplemental filing, the similarly situated ten percent who were sentenced in our circuit will be precluded from doing so for no other reason than that they were sentenced in our circuit.

United States v. Higdon, No. 03-14365, 2005 WL 1677544, at *11 (11th Cir. July 8, 2005) (Tjoflat, J., dissenting from denial of rehearing en banc) (footnotes omitted). Further, as Judge Tjoflat also noted, this procedure will inevitably result in sentencing disparities, thereby frustrating the objectives of Congress in passing the Sentencing Reform Act. *Id.*

The anomalous procedure of the Eleventh Circuit is contrary to this Court's holding that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. Respondent has failed to explain why *Griffith* does not require that *Booker* be applied to Petitioner's case.

b. Respondent also seeks to justify the Eleventh Circuit's procedure as a "nonjurisdictional waiver provision." (Resp. 14-15.) This is contrary to Federal Rule of Criminal

Procedure 52(b) and this Court's holding in *United States v. Olano*, 507 U.S. 725, 732-733 (1993) that: "If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." This conclusion is rooted in the distinction: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." *Olano*, 507 U.S. at 733. As Judge Barkett pointed out in *Levy*, it is impossible to preclude a *Booker* claim on the basis of a finding that a defendant has waived an issue that had already been definitively foreclosed by the Eleventh Circuit in *United States v. Sanchez*, 269 F.3d 1250, 1262 (11th Cir. 2001). *Levy*, 391 F.3d at 1354 (Barkett, J., dissenting from denial of rehearing en banc).

The Eleventh Circuit's procedure, which precludes *all* review of *Booker* claims by defendants who are on direct review improperly denies even review for plain error. The Eleventh Circuit's pre-emptive elimination of review of errors which affect a defendant's substantial rights is inconsistent with the holdings of this Court and the Federal Rules of Criminal Procedure.

c. Respondent does not contest that there is a split among the circuit courts of appeal on this issue. Instead, Respondent argues that the Fifth Circuit, which had previously entertained *Booker* claims raised after a defendant's opening brief, "recently has followed Eleventh Circuit precedent" to deny such claims "absent extraordinary circumstances." (Resp. 14 n.6.) A careful examination of the three Fifth Circuit cases

Respondent relies on, *United States v. Taylor*, 409 F.3d 675, 677 (5th Cir. 2005) (per curiam), *United States v. Hernandez-Gonzalez*, 405 F.3d 260, 261-262 (5th Cir. 2005), and *United States v. Lewis*, No. 04-10102, 2005 WL 1394949, at *1 (5th Cir. June 14, 2005) (per curiam), reveals that the Fifth Circuit reviewed each defendant's claim for plain error before determining that whether the defendant could establish "extraordinary circumstances." Under the Eleventh Circuit rule, the presence or absence of plain error is irrelevant to review. *See Higdon*, 2005 WL 1677544, at *9 n.9 (Tjoflat, J., dissenting from denial of rehearing en banc).

Respondent argues that most of the circuits "simply address *Booker* claims on their merits without citing or discussing the general rule that courts will not entertain issues not raised in a party's opening brief." (Resp. 13.) However, as Judge Tjoflat recently pointed out, "Post-*Booker*, it continues to be clear that [the Eleventh Circuit's] approach is contrary to that of every other circuit." *Higdon*,, at *8 (collecting cases).

This is not a simple matter of a "local rule" adopted by the Eleventh Circuit. (Resp. 14.) Rather, the Eleventh Circuit procedure invokes a rule which precludes *all* review of *Booker* claims by defendants who failed to raise the issue in their initial brief before that court. It is the effect of this procedure and the consequential disparate treatment between defendants in the Eleventh Circuit and every other circuit that establishes the conflict that justifies granting this petition.

d. Respondent also argues the Eleventh Circuit rule promotes judicial efficiency by avoiding piecemeal briefing. (Resp. 15.) Petitioner's case does not involve an effort to raise an issue that could or should have been raised in his initial brief. It involves an issue which was completely

foreclosed by en banc Eleventh Circuit precedent at the time his initial brief was filed. *Sanchez*, 269 F.3d at 1262. Rather, Petitioner seeks only what defendants in every other circuit currently enjoy: review under the new rule announced by this Court in *Booker* which this Court held must be applied "to all cases on direct review." 125 S.Ct. at 769.

Moreover, as recognized by Judge Tjoflat, the Eleventh Circuit's procedure will "encourage[ ] defendant-appellants to raise frivolous claims that are squarely foreclosed by circuit and Supreme Court precedent on the off chance that an unanticipated decision will make them suddenly viable." *Vanorden*, 2005 WL 1531151 at *2 (Tjoflat, J., concurring specially); *see also Levy*, 391 F.3d at 1348 (Tjoflat, J., dissenting from denial of rehearing en banc). As a consequence, Judge Tjoflat concluded, "the rule will do great harm to the fair and efficient administration of justice in this circuit." *Levy*, 391 F.3d at 1350.

e. Finally, Respondent argues that this Court should not even accord Petitioner the opportunity this Court has routinely granted other petitioners in his precise situation. Although this is Petitioner's first application for certiorari, Respondent contends that this Court's practice of vacating petitioners' convictions and remanding for further consideration in light of *Booker* should not apply to Petitioner Drury's case for two reasons.

First, Respondent argues that a remand will make no difference to the Eleventh Circuit, which has refused to alter its rule precluding review. (Resp. 16.) The Eleventh Circuit's intransigence on this issue should not constitute a basis to deny Petitioner's case full review under *Booker*, nor to truncate proceedings in his case on direct review so as to possibly deprive Petitioner of the effect of a subsequent

opinion that brings the Eleventh Circuit in line with the other circuits. As demonstrated by the dissents from denial of rehearing en banc in *Ardley, Levy,* and *Higdon*, this issue is hotly contested within the Eleventh Circuit and has not been settled definitively by that court sitting en banc. Pursuant to a GVR Order by this Court, the Eleventh Circuit may select Petitioner's case as the vehicle to re-examine its anomalous procedure. Petitioner deserves *all* his days in court, not just those on which he is likely to prevail, for, as the Eleventh Circuit itself stated in yet another recent application of its "strange and bad rule:" "It is through this process that the law evolves." *United States v. Pipkins*, No. 02-14306, 2005 WL 1421449, at *1 (11th Cir. June 20, 2005).

Second, Respondent argues, this Court should deny this petition outright because the Eleventh Circuit denied Petitioner's *Booker* claim six days after *Booker* was decided and Petitioner stated in his initial petition in this Court, (Pet. 8), that the court of appeals was undoubtedly aware of *Booker* at the time of its denial. (Resp. 17.) Neither of these contentions supports any conclusion that the court of appeals *reviewed* Petitioner's claim in light of *Booker*. The denial of Petitioner's motion by the Eleventh Circuit, which did not cite *Booker*, (Pet. App. 103a-104a), appears to have ~~been a pro-forma~~ denial based on the Eleventh Circuit's rule. By its own statement of its procedure, the Eleventh Circuit "does not *consider Blakely,* now *Booker*, issues not raised in any way in a party's initial brief." *Levy*, 2005 WL 1620719, at *5. This Court has continued to routinely enter GVR Orders in such caseseven those emanating from the Eleventh Circuit--notwithstanding the timing of the Eleventh Circuit's action on the initial *Booker* claim vis-à-vis the date that *Booker* was handed down. *See, e.g., Baussan v. United States*, 125 S.Ct. 2982 (June 27, 2005) (Mem.); *Alexis v. United States*, 125 S.Ct. 2927 (June 13, 2005) (Mem.); *Hembree v. United*

States, 125 S.Ct. 1904 (June 13, 2005) (Mem.). There is no justification for excluding Petitioner's case from this orderly procedure, and Respondent offers none. *See also Stutson v. United States*, 516 U.S. 193, 197 (1996) ("[A] GVR order guarantees to the petitioner full and fair consideration of his rights in light of all pertinent considerations....").

2. Respondent also opposes Petitioner's second ground for certiorari, relating to the question of whether the version of 18 U.S.C. § 1958(a) in effect at the time of the events forming the basis for Petitioner's conviction should require proof that a communication furthering the offense traveled in interstate commerce. (Resp. 17-18.) Respondent concedes that there is a circuit conflict on this issue, (Resp. 17), but argues that since a 2004 statutory amendment eliminated the ambiguity, the question would affect only the outcome of cases involving the former statute and is, therefore, "of slight and diminishing practical importance." (Resp. 18.)

While the number of cases prosecuted under the previous version of § 1958(a) may diminish over time, Respondent does not demonstrate they are insignificant in number. Based on Justice Department statistics, from 2000 to 2003 (the most recent year available), there were approximately 26 indictments brought each year where murder-for-hire under the former § 1958 was the most serious charge. Federal Justice Statistics Resource Center, http://fjsrc.urban.org/newweb/t_sec/t_sec.cfm. Since crimes under former § 1958 could still be indicted up until December of 2009 under the applicable statute of limitations, and there are undoubtedly numerous cases from at least the past several years which are still awaiting trial or on direct appeal, the number of affected cases is far from insignificant.